U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0189 BLA

CHESTER JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ICG HAZARD, LLC	)	
	)	
and	)	
	)	
ARCH COAL INCORPORATED	)	DATE ISSUED: 11/09/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Willow Eden Fort, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Willow Eden Fort's Decision and Order Awarding Benefits (2018-BLA-06340) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on January 9, 2017.[1]

The ALJ accepted the parties' stipulation that Claimant had thirty-six years of coal mine employment. She found Claimant established complicated pneumoconiosis and, therefore, invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act and established a change in an applicable condition of entitlement.[2] 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.304, 725.309(c). Further, she found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b). Thus, she awarded benefits commencing April 2017.

On appeal, Employer asserts the ALJ deprived it of due process by taking judicial notice of physician qualifications. On the merits, it argues she erred in finding Claimant established complicated pneumoconiosis and in determining the commencement date for benefits.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless requested to do so.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] Claimant filed one prior claim. Director's Exhibit 1. The district director denied it, but the record does not indicate the basis for the denial. *Id.* Thus, the ALJ proceeded as if Claimant had not established any element of entitlement in the prior claim. Decision and Order 2-3.

[2] Where a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the ALJ presumed Claimant failed to establish any element of entitlement in the prior claim, she found he had to submit new evidence establishing at least one element of entitlement to proceed with this claim. *See* 20 C.F.R. §725.309(c); *White*, 23 BLR at 1-3; Decision and Order at 16.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established thirty-six years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3.

accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Due Process Challenge

We initially address Employer's argument that the ALJ failed to provide it a fair hearing because she "reached outside of the record" when considering the credentials of Drs. Crum and Ramakrishnan. Employer's Brief at 5-7. We reject its contentions.

An ALJ must evaluate the evidence of record and not rely on information outside the record unless she takes judicial notice and gives the parties an opportunity to respond. 29 C.F.R. §18.84; *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 138-39 (1990). To demonstrate a due process violation, Employer must demonstrate it was deprived of notice and a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

This case was originally assigned to ALJ Larry A. Temin, who presided at the hearing. Notice of Hearing and Prehearing Order; Decision and Order at 1 n.1, 3. ALJ Temin subsequently retired, and the case was ultimately reassigned to the ALJ. Orders Regarding Reassignment; Decision and Order at 3.

At the hearing that ALJ Temin held, he notified the parties that if a physician's credentials are not in the record, he would take judicial notice in order to ascertain the qualifications of the physician. Hearing Transcript at 19. ALJ Temin asked if either party objected and neither party did so. *Id.* In her Decision and Order, the ALJ acknowledged ALJ Temin's notification to the parties of his intention to take judicial notice and that neither party objected. Decision and Order at 3. Finding the record did not include the credentials of Drs. Crum, Ramakrishnan, and Tiu, the ALJ took judicial notice of their qualifications. Decision and Order at 7, 9. After the ALJ issued her Decision and Order, Employer submitted a motion for reconsideration, but its only argument was that the ALJ's finding concerning the commencement date for benefits was irrational. Employer's Petition for Reconsideration to the ALJ.

Employer was given adequate notice in this case. *See Maddaleni*, 14 BLR at 139. It was notified of ALJ Temin's intention to take judicial notice of physician qualifications

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 19, 22-29; Director's Exhibits 4, 10, 11.

at the hearing, and it had the opportunity to object but did not do so. Hearing Transcript at 19. Employer was also notified of the ALJ taking judicial notice within her Decision and Order and did not raise the issue in its motion for reconsideration. Decision and Order at 3. It has therefore failed to demonstrate, under the facts of this case, how it was deprived of notice and opportunity to respond. *See Holdman*, 202 F.3d at 883-84.

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90 (6th Cir. 1999); *Melnick v. Consol. Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray and computed tomography (CT) scan evidence supports a finding of complicated pneumoconiosis, but the medical opinion evidence does not support complicated pneumoconiosis.[5] 20 C.F.R. §§718.304(a), (c); Decision and Order at 5-15. She found the x-ray and CT scan evidence outweighs the contrary medical opinions. Decision and Order at 15.

20 C.F.R. §718.304(a) – X-Rays

Employer does not challenge the ALJ's finding that the x-ray evidence supports complicated pneumoconiosis other than restating its argument that the ALJ improperly took judicial notice of the physicians' credentials, which we have rejected above. Employer's Brief at 5-7. Thus we affirm her finding the x-ray evidence supports a finding of complicated pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.304(a); Decision and Order at 8.

[5] The record does not contain evidence of a biopsy or autopsy. 20 C.F.R. §718.304(b).

20 C.F.R. §718.304(c) – CT Scans

The ALJ next weighed two interpretations of a CT scan dated April 3, 2020. Decision and Order at 8-12; Claimant's Exhibits 2, 3; Employer's Exhibit 3. Dr. Crum interpreted the CT scan as positive for complicated pneumoconiosis based on the presence of a Category A opacity that measures 1.1 centimeters in the right lung. Claimant's Exhibit 2 at 1-2. In contrast, Dr. Meyer interpreted the CT scan as negative for complicated pneumoconiosis. Employer's Exhibit 3. He observed a nine-millimeter nodule in Claimant's right lower lung consistent with simple pneumoconiosis.[6] *Id.*

The ALJ found Drs. Crum and Meyer equally qualified. Decision and Order at 9-10. She assigned Dr. Meyer's interpretation less weight as being contrary to the x-ray evidence. *Id.* at 11-12. She also found his reading is not credible because he did not explain why the mass of simple pneumoconiosis he observed on Claimant's CT scan would not appear as one centimeter on an x-ray. *Id.* Because Dr. Crum's reading is consistent with the x-rays and he considered Claimant's thirty-six years of coal mine employment, she found that his reading is credible and entitled to the most weight. Decision and Order at 10, 12.

Employer argues the ALJ erred in evaluating the professional credentials of Drs. Meyer and Crum by not finding Dr. Meyer's credentials superior to Dr. Crum's. Employer's Brief at 8-9. We disagree. Credibility determinations are within the ALJ's discretion. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 712-14 (6th Cir. 2002). The ALJ acknowledged the credentials of Drs. Crum and Meyer, including their teaching and academic credentials, and permissibly found they are still equally qualified as both are dually-qualified as B readers and board-certified radiologists. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); Decision and Order at 9-11.

Employer argues the ALJ should have discredited Dr. Crum's opinion that the "1.1 centimeter large opacity" present on the CT scan "most likely represents progressive massive fibrosis category A" as equivocal. Employer's Brief at 8. This argument has no merit as the ALJ permissibly found his reading is not equivocal and is reasoned and

[6] Dr. Tiu reviewed the CT scan as part of his medical treatment of Claimant and identified "multiple and diffuse . . . pulmonary nodules . . . consistent with coal workers' pneumoconiosis." Claimant's Exhibit 3. We affirm as unchallenged the ALJ's finding Dr. Tiu's reading is silent on complicated pneumoconiosis and thus does not weigh against or in favor of a finding of the disease. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

documented. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763 (4th Cir. 1999) (opinion that pneumoconiosis "could be" a complicating factor in miner's death was not equivocal); *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366 (4th Cir. 2006) ("refusal to express a diagnosis in categorical terms is candor, not equivocation"); Decision and Order at 9-10. Moreover, Employer's argument misconstrues Claimant's burden of proof: Claimant only has to establish it is more likely than not that he suffers from complicated pneumoconiosis; he need not prove it to a certainty. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994). Dr. Crum's statement, if fully credited, exceeds that standard.

With respect to Dr. Meyer, the ALJ permissibly found his CT scan reading does not undermine a finding of complicated pneumoconiosis based on the x-ray readings because he did not explain why the nine-millimeter opacity of simple pneumoconiosis he observed in the right lung would not appear on an x-ray as measuring at least one centimeter, thereby undermining the x-ray evidence of the disease. *Napier*, 301 F.3d at 712-14; Decision and Order at 10-11. Although Employer argues Dr. Meyer's reading is adequately explained, its argument is a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis based on the April 3, 2020 CT scan. 20 C.F.R. §718.304(c); Decision and Order at 12. We further affirm, as unchallenged on appeal, the ALJ's finding that the medical opinion evidence excluding complicated pneumoconiosis is less credible than the x-ray and CT scan evidence. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14. Because Employer raises no further argument, we affirm the ALJ's finding that all the relevant evidence considered together establishes complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33; Decision and Order at 14-15. We further affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 15. Thus, we affirm the award of benefits.

Commencement Date for Benefits

Employer argues the ALJ did not explain her finding regarding the date for the commencement of benefits. Employer's Brief at 9-11. We disagree.

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable, benefits commence the month the claim was filed, unless evidence the ALJ credits establishes Claimant was

not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). As the ALJ found Claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, she had to determine whether the evidence establishes the onset date of complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

The ALJ found Claimant's x-ray taken March 15, 2017, establishes he had simple pneumoconiosis but not complicated pneumoconiosis after he filed his claim. Decision and Order at 16-17. Although she found the February 27, 2020 x-ray positive for complicated pneumoconiosis, Decision and Order at 16-17, she permissibly found the record does not establish when Claimant's simple pneumoconiosis later became complicated pneumoconiosis; only that Claimant's complicated pneumoconiosis arose before February 2020. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); Decision and Order at 16-17. Thus she rationally found the earliest date Claimant's benefits could commence is April 2017, the month after the March 15, 2017 x-ray.[7] *Williams*, 13 BLR at 1-30; February 13, 2023 Order.

Because it is supported by substantial evidence, we affirm the ALJ's finding that benefits should commence in April 2017. *Williams*, 13 BLR at 1-30; Decision and Order at 16-17; February 13, 2023 Order.

[7] The ALJ originally found benefits should commence in June 2017. In response to motions for reconsideration by Claimant, the Director, and Employer, the ALJ stated her original finding of June 2017 was a typographical error and entered an order amending the date to April 2017. February 13, 2023 Order. We note Employer argues on appeal that the ALJ failed to explain her finding benefits should commence in June 2017. Employer's Brief at 9-11. It does not acknowledge the ALJ's subsequent order.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge